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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5848

HOWARD WILLIAM GOYNES, ET UX.,
Petitioners,

v.

ERNEST JAMES BURNS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR RESPONDENTS IN OPPOSITION

PETITION NOT PRINTED

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The petitioner, Howard William Goynes, was injured in an automobile accident, when the car he was driving was struck by a truck owned by the respondent Blackburn and operated by the respondent Burns. Goynes and his wife (petitioners) brought suit against the respondents for their injuries in the Circuit Court for Anne Arundel County. The case was tried before Judge Childs and a jury, which found a verdict in favor of the defendants (respondents). The petitioners moved for judgment N.O.V. and for a new trial. The court granted the motion for judgment

N.O.V. on the issue of liability and entered judgment thereon and *granted a new trial on the issue of damages only,* docket entry October 29, 1971, Rules 563(b) (1) and 567 c Maryland Rules of Procedure, and not a conditional new trial on the issue of liability (as stated by the petitioners). See Rules 563 b 3 and 563 c 1.

The Court of Special Appeals of the State of Maryland reversed the judgment of the Circuit Court for Anne Arundel County entered for the plaintiffs and entered a judgment for the defendants on the jury's verdict. Rule 563 c 1. The awarding by the lower court of a new trial on the issue of damages only was vacated by the Court of Special Appeals as the grant of the partial new trial was indiscerptible from the grant of the judgment N.O.V.

The petitioners filed a motion for reargument with the Court of Special Appeals based in part on the argument that that court had misconstrued the evidence, and in part on the argument that that court, in refusing to order a new trial, had misconstrued the law and the Maryland Rules of Procedure, the lower court's opinion and the docket entries. When that motion was denied, they filed a petition for a writ of certiorari to the Court of Appeals of Maryland, making the same contentions as in the motion for reargument. The petition for the writ was denied. It is the judgment of the Court of Special Appeals that the petitioners seek this court to review.

The petitioners contend here that the Court of Special Appeals by entering judgment for the defendants and by refusing to send the case back for a new trial on all issues has misconstrued the Maryland case law and Rules of Procedure, particularly Rule 563 c 1 and Rule 567, and that such misconstructions deprive them of a right to trial by jury and due process of law.

It is submitted:

(1) that the Maryland courts have the power to adopt and construe rules of practice in its courts.

(2) that those rules as construed by the Maryland courts raise no issues under the Constitution of the United States.

(3) that petitioners have had a trial by jury in court.

(4) that the Court of Special Appeals has reviewed the evidence and the law and has held that, under Maryland law, the evidence was legally sufficient to warrant the jury's verdict for the respondents. It further held that since the lower court had granted a new trial on the issue of damages only, and had not granted a conditional new trial on the issue of liability, the Maryland Rules of Procedure, as construed by the Maryland courts, permitted the entering of a judgment by an appellate court upon the original verdict, as justice may require, which it did.

(5) that all of the issues raised by the letter written by the nisi prius judge, ex parte, after the opinion by the Court of Special Appeals had been filed, in answer to a letter written by counsel for the petitioners (this letter by counsel, even yet, respondent's counsel have not seen nor discussed with the nisi prius judge) dealt with opinions of the judge about factual matters never discussed with the judge as to their relevance, propriety, or accuracy, and most dealt with factual matters outside the record. The comment in that letter on the racial makeup of the jury panel is the first time that the racial qualification of the jurors was mentioned by anyone and no objection at any time to the panel was ever made by either party to the trial court or to the Court of Special Appeals.

This letter raises no constitutional issue. It was before the Court of Special Appeals on the petitioner's motion for reargument and before the Court of Appeals on petitioner's petition to that court for writ of certiorari. The Court of Special Appeals, in refusing the motion for reargument, and the Court of Appeals in declining to issue the writ of certiorari, decided either that the letter was not properly before them or that it did not justify any further consideration of the case.

ARGUMENT

Procedure in Maryland is governed by the Maryland Rules of Procedure, *Grain Dealers Mutual Insurance Company v. Van Buskirk*, 241 Md. 58, 215 A.2d 467.

The pertinent rules are the following:

Rule 563. Judgment N.O.V. ..... Law.

a. Motion

1. When to Be Filed — 3 Days.

Where a motion for a directed verdict made by a party at the close of all the evidence is denied then (1) within three days after the reception of a verdict, such party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict.

* * * * * *

3. Use With Motion for New Trial.

A motion for a new trial may be joined with a motion for judgment under this Rule, or a new trial may be prayed in the alternative.

* * * * * *

b. Disposition.

1. If Verdict Returned.

If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment, and

either order a new trial or direct the entry of judgment as if the requested verdict had been directed.

3. Court to Rule on Motion for New Trial.

If the motion for judgment is granted, the court shall also rule upon any motion for new trial, but the new trial if granted shall be had only if the judgment so entered is reversed on appeal.

c. Appeal — Effect of Reversal.

1. Of Judgment N.O.V.

Where a judgment so entered by the trial court is reversed on appeal, the appellate court (1) shall remand the case for a new trial if the lower court conditionally so ordered or (2) otherwise may order a new trial or enter such judgment upon the original verdict as justice may require.

Rule 567. New Trial ..... Law.

* * * * * *

b. Grounds to Be Assigned.

All reasons for said motion shall be filed in writing within the time limited for the filing of said motion, and no other reason shall be thereafter assigned without leave of court.

c. Partial — Severable Matter.

Where it appears to the court upon a motion for a new trial that any grounds for a new trial affect only a severable part of the matters in controversy, or only some or one of the parties, the court may grant a new trial as to such part, or as to such party and either enter final judgment as to the remaining parts or parties, or stay the entry of final judgment until after the new trial.

It is axiomatic that decisions of state courts construing state law are binding on the federal courts; *Erie Railroad v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, and that the Constitution of the United States does not require that a state follow federal procedure or any particular procedure, provided the procedure it does follow, does not violate

fundamental principles of justice. *Bute v. Illinois*, 333 U.S. 640, 92 L. Ed. 986.

The Court of Appeals of Maryland has construed these rules as empowering an appellate court to enter a judgment for the party who won the verdict, when there had been a trial by a jury. Such judgment can be entered by the appellate court when the motion for judgment N.O.V. was coupled with a motion for a new trial by the losing party and when the trial court granted the motion for judgment and did not grant a conditional new trial in the event the judgment N.O.V. was reversed on appeal and when in its opinion justice so required. *Fennell v. G.A.C. Finance Corporation*, 242 Md. 209, 218 A.2d 492. In the instant case, the trial judge granted the motion for judgment N.O.V. and *granted the motion for a new trial on the issue of damages only*. The Court of Special Appeals exercised the discretion given it by Rule 563 c 1, and being of the opinion that justice so required, entered judgment for the respondents. The Court of Appeals refused to issue a writ of certiorari to review this action.

The contention that the petitioners were deprived of a fair trial because there was only one black on the jury list and none on the jury is without merit. There is no intimation nor argument that blacks were in any way systematically excluded from the panel of jurymen and the mere fact that there were none on the jury does not deprive the petitioners of any constitutional right. *Swain v. Alabama*, 380 U.S. 202, 13 L. Ed. 2d 759 and *U. S. v. Di Tommaso* (C.A. 4 Md.) 405 F.2d 385 cert. den. 394 U.S. 934, 22 L. Ed. 2d 465.

Furthermore, no objection was made to the panel nor to the jury as sworn on the basis of race or for any reason. Such objection, if valid, was waived. The question as to

possible racial bias of the jury was presented for the first time in the motion for reargument in the Court of Special Appeals, and was based on nothing more than the visceral reaction of the trial judge to the verdict. *Francis v. Southern Pacific Co.*, 333 U.S. 445, 92 L. Ed. 798.

It is submitted that the petitioners have had a full adversary hearing under the Maryland rules as construed by its courts and applied in accord with fundamental principles of justice.

The contention that the petitioners were deprived of a trial by jury guaranteed by the Seventh Amendment is frivolous. The petitioners have already had a jury trial. Furthermore, the right to a jury trial preserved to parties in civil cases in the Federal Courts by the Seventh Amendment to the United States Constitution does not apply to the states. *Chicago, R.I. & P.R. Co. v. Cole*, 251 U.S. 54, 64 L. Ed. 133, Annotation, *Bill of Rights in State Courts*, 18 L. Ed. 2d 1388, 1410.

CONCLUSION

As there is no constitutional issue involved and as the petition is based on a misreading of the record and docket entries, it is submitted the petition for writ of certiorari should be denied.

Respectfully submitted,

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